

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

JILL R. REED and ALICE NEWLIN,

Appellants,

v.

ISLAND COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondent.

7/
SHB NO. 92-71

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter came on for hearing before the Washington State Shorelines Hearings Board on May 7 and 8, 1992, in Lacey, Washington. Board Members present were Annette S. McGee, Presiding, Chairman Harold S. Zimmerman, Richard S. Gidley, Nancy Burnett, and Thomas Cowan.

Appellants Jill R. Reed and Alice Newlin appeared through J. Richard Aramburu, Attorney at Law. Respondent Department of Ecology (DOE) appeared by Allen T. Miller, Jr., Assistant Attorney General. Respondent Island County appeared by David L. Jamieson, Jr., Deputy Prosecuting Attorney. The proceedings were recorded on May 7, 1992 by court reporter Kim Otis of Gene Barker & Associates, Olympia, and by Robert H. Lewis & Associates, Tacoma on May 8, 1992.

Exhibits were admitted and examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

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(1)

1
2 FINDINGS OF FACT

3 I

4 This appeal arises from a DOE and Island County Joint Order to Cease and Desist, and
5 Notice of Civil Penalty issued to Alice Newlin and Jill Reed for the construction of a wood
6 fence on their property located on the shore of Useless Bay in the vicinity of Double Bluff.
7 The fence was constructed without a permit.

8 II

9 The Reed/Newlin parcel in question is within 200 feet of the ordinary high water mark
10 of Puget Sound and is adjacent to and generally southwest of the end of Double Bluff Road, a
11 county owned waterfront parking area.

12 III

13 The Reed/Newlin parcel is designated Natural Shoreline in the Island County Shoreline
14 Master Program (ICSMP), although due to development over the last several years of a
15 bulkhead and backfill, a vehicular access road over the Reed/Newlin property and residential
16 homes, the property is no longer "relatively free from human influence."

17 IV

18 In May and June, 1991, the appellants, Jill R. Reed and Alice Newlin, through their
19 representative, Bruce Reed, the husband of Jill Reed and son-in-law of Alice Newlin, had an
20 opaque wooden fence over six feet tall built between the Reed/Newlin lot and the county
21 public parking area. The fence is more than one hundred feet in length from the bulkhead,
22 waterward of the ordinary high water mark, to the toe of the bluff behind the property,

23 The reason the appellants had the fence built was to protect their privacy (although
24 there is no building on their lot) and to prevent trespassing members of the public from using
25 their property to reach the state owned public tidelands.

The appellants did not request nor obtain a shoreline permit from Island County for the building of the fence.

V

The only direct access to the state owned public beach from the adjacent county parking area is for people to climb over large boulders, commonly known as rip-rap, or trespass through the Reed/Newlin property.

VI

The County parking lot dates back to 1938 and had a gravel base before the County asphalted and striped 22 parking stalls in 1987.

VII

The public has historically trespassed over the Reed/Newlin property for physical access to the public beach, as such access is easier than climbing over large boulders from the county parking lot end. The public has also used the Reed/Newlin property for their own enjoyment, including horesback riders, motorcyclists, three wheelers, wind surfers, kayakers, picnickers, clam diggers and school children on field trips.

VIII

Over the last 30 years Reed/Newlin erected two fences and tried to maintain them at or near the boundary between the county parking lot and the Reed/Newlin property.

"Private property" and "no trespassing" signs were placed on the fences. The fences and signs were vandalized or removed by members of the public.

IX

Some of the residents on the Island use the parking lot as a viewpoint. However, there are no benches for sitting to enjoy the view nor garbage or restroom facilities for public use at

1 the parking lot, and the county sheriff only visits the parking area when called by a
2 complainant.

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4 X

5 The new fence provides a barrier between the public parking lot and appellants'
6 property allowing them certain qualitative values. It does not have unreasonable physical
7 adverse impacts on the ecology or shoreline environment. However, the new fence
8 significantly blocks the westerly and southwesterly view from the parking area. The view to
9 the south and southeast is not affected.

10 XI

11 Only small remnants of prior fences remained when the new fence was built, and the
12 prior fences were not opaque and did not significantly block the public's view of the waters
13 and public shorelines.

14 XII

15 Fences are an unclassified use in the Natural Shoreline Designation under the ICSMP.
16 The fence in question is not appurtenant to a single family residence, because there is no
17 residence on the site, and no permit for a single family residence has been applied for. The
18 Island County Planning Director, pursuant to ICSMP 16.21.035, determined that erection of
19 the Reed/Newlin fence in the Natural Shoreline designation was a Conditional Use which
20 needed a Conditional Use Permit prior to the fence being erected.

21 XIII

22 The new fence is not ordinary repair or maintenance of the prior fences, as the prior
23 fences were of different construction (see through), as well as shorter in length and height than
24 the new fence.

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XIV

By letters dated July 8, July 23 and July 25, 1991, Jill Reed and Alice Newlin were informed by the Island County Planning Director, who is the ICSMP Administrator, that the fence, built without a Conditional Use Permit, was in violation of the Shoreline Management Act and the ICSMP. No remedial action was taken by Reed/Newlin following receipt of the letters, other than Bruce Reed cutting the fence to six feet in height.

XV

Appellants are familiar with obtaining permits under the ICSMP from two former Shorelines Hearings Board cases. Even after being informed of the requirement to obtain a Conditional Use Permit by letters from the Island County Planning Department in July, the appellants didn't apply for an after-the-fact permit.

XVI

On August 26, 1991, the Department of Ecology and Island County jointly issued the appellants a Shoreline Order to Cease and Desist and Notice of Penalty Incurred. Appellants applied to the Department of Ecology for relief from the penalty. The request for relief was denied by Ecology by letter dated October 8, 1991. On November 21, 1991, appellants filed an appeal of the civil penalty with this Board, which became SHB case number 91-71.

XVII

Any Conclusion of Law deemed to be a Finding of Fact, is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

We conclude the Board has jurisdiction over the parties and subject matter of this action pursuant to RCW 90.58.210(4) and chapter 173-17 WAC.

FINAL FINDINGS OF FACT,
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1
2 II

3 The fence built by appellants was within 200 feet of the ordinary high water mark of
4 Puget Sound waters and within the Natural Shoreline Designation under the ICSMP.

5 III

6 The fence built by the appellants constitutes "development" as that term is defined in
7 RCW 90.58.030(3)(d). A shoreline master program can require the issuance of a Shoreline
8 Conditional Use Permit before construction of a development.

9 IV

10 Fences are Unclassified Developments in the Natural Shoreline environment under the
11 ICSMP, and the County Shoreline Administrator, the Planning Director, is required to
12 determine under the ICSMP which is the appropriate Use Classification; that is, Primary Use,
13 Secondary Use, or Conditional Use for a fence to be built. The Shoreline Administrator
14 properly concluded that the construction of a fence is a Conditional Use in the Natural
15 Shoreline Environment requiring the issuance of a Shoreline Conditional Use Permit prior to
16 the fence being built.

17 V

18 Following notice by three letters to appellants that their fence was in violation of the
19 Shoreline Management Act and the ICSMP and the appellants' failure to take meaningful
20 remedial action, the Department of Ecology and Island County issued a Shoreline Order and
21 Civil Penalty pursuant to RCW 90.58.210 and Chapter 173-17 WAC.

22 VI

23 Shoreline Docket No. 91-SH-161, Order to Cease and Desist and Notice of Penalty
24 Incurred, issued by the Department of Ecology and Island County, should be affirmed subject
25 to the appellants being afforded an opportunity to apply for an after-the-fact Shoreline

1 Conditional Use Permit. Because the appellants either are, or should be, familiar with the
2 shoreline permit requirement through their past experience with shoreline permits on their
3 property, the civil penalty imposed should be upheld.
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5 VII

6 Any Finding of Fact which is deemed a Conclusion Law is hereby adopted as such.
7 From these Conclusions of Law, the Board makes the following
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ORDER

The Shoreline Order to Cease and Desist and Civil Penalty in Docket No. 91-SH-161, jointly issued by the Department of Ecology and Island County, is hereby AFFIRMED, subject to the following condition:

Provided that the appellants file with Island County a Shoreline Conditional Use Permit application within 30 days of the date of this written decision, the terms of the Order to remove the fence will be stayed until a final decision is rendered on the permit application by the County or until resolution of any subsequent appeal.

In light of the facts that this hearing has provided, the Board strongly suggests that the County and/or state consider providing appropriately adequate physical access to the state owned public tidelands at Double Bluff to eliminate the public trespassing across the Reed/Newlin property to gain access.

DONE at Lacy, WA, this 30th day of June, 1992.

SHORELINES HEARINGS BOARD

Annette S. McGee
ANNETTE S. MCGEE, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Nancy Burnett
NANCY BURNETT, Member

Thomas R. Cowan
THOMAS R. COWAN, Member by Jg

Richard S. Gidley by A Mc
RICHARD S. GIDLEY, Member

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